

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

74-2256

To be argued by
THOMAS J. CONCANNON

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

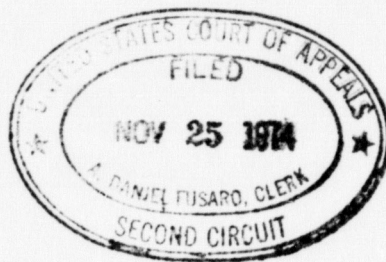
HENRY J. JEFFREY,

Appellant.

Docket No. 74-2256

APPENDIX TO APPELLANT'S BRIEF

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
FEDERAL DEFENDER SERVICES UNIT
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THOMAS J. CONCANNON,
Of Counsel

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PAGINATION AS IN ORIGINAL COPY

CRIMINAL DOCKET
UNITED STATES DISTRICT COURT

D. C. Form No. 100 Rev.

JUDGE GAGLIARDI
TITLE OF CASE

73 CRIM. 505

THE UNITED STATES

vs.

1) WALTER SCOTT

2) HENRY J. JEFFREY

ATTORNEYS

For U. S.: 264-6427

John P. Cooney, Jr.

For Defendant:

(02) STATISTICAL RECORD

COSTS

DATE

NAME OR
RECEIPT NO.

REC.

DISB.

J.S. 2 mailed

Clerk

J.S. 3 mailed 1/2

Marshal

Violation

Docket fee

Title 18

Sec. 371 conspiracy to embezzle
mail (ct.1)-- 1709 & 2 P.O.
employee embezzling mail
(cts. 2 & 3)

--THREE COUNTS--

DATE

PROCEEDINGS

5-29-73

Filed Indictment.

6-11-73

Jeffrey- Deft. (Atty. present) pleads not guilty - bail continued.
Scott- Deft. (Atty. present) pleads not guilty - bail in the sum of \$1,000. P.R.E.
continued. Case assigned to Judge Gagliardi. --- Palmieri, J.

9-24-73

Filed Govt's notice of readiness for trial.

1-18-74

Filed W. Scott's motion for dismissal of indictment.

1-18-74

Filed W. Scott's memorandum in support of motion to dismiss.

1-18-74

Filed H. Jeffrey's motion to dismiss the indictment.

1-18-74

Filed Govt's affidavit in opposition to motions of defts to
dismiss.

1-18-74

Filed Govt's memo in opposition to motions to dismiss.

DATE	PROCEEDINGS
18-74	Filed OPINION #40244...Accordingly, Scott's motion to dismiss the indictment is granted. Gagliardi, J. mn
1/74	W. Scott- filed CJA 20 approval for payment of fees of atty. Gagliardi, J. mailed copies.
21/74	Filed deft's memo of law in support of motion to dismiss.
21/74	Filed OPINION # 40850 - ...Deft.'s motion to dismiss is denied. Gagliardi, J. mn
6/24/74	Henry J. Jeffrey (atty present) pleads not guilty. Deft. waives his rights to a trial by jury. Waiver signed and filed this date. Court finds the deft. GUILTY. Pre-sentence investigation ordered. For sentence on 9/12/74 at 9:30. Deft. cont.'d on present bail until date of sentence. Gagliardi, J.
7/24/74	Filed waiver of trial by jury. approved Gagliardi, J.
1/29/74	Filed Stipulation re: individuals to testify.
8-2-74	Filed transcript of record of proceedings, dated 7-24-74
12/74	HENRY J. JEFFREY- (atty. present) It is adjudged that the imposition of sentence is suspended. Deft. is placed on THREE (3) YEARS probation on each of counts 1,2,3 CONCURRENTLY and fined TWO THOUSAND and ONE HUNDRED (\$2,100.) DOLLARS to be paid during the period of probation on a schedule to be agreed upon and approved by the Probation Department. Gagliardi, J. Issued copies ent. 9/20/74.
17/74	Henry Jeffrey- filed notice of appeal from judgment of 9/12/74. mailed copies.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



----- x
UNITED STATES OF AMERICA :

-v- :

INDICTMENT

WALTER SCOTT and
HENRY J. JEFFREY,

: 73 Cr.
:

Defendants.
----- x

73 CRIM. 505

The Grand Jury charges:

From on or about the first day of January, 1972 and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York, WALTER SCOTT and HENRY J. JEFFREY, an employee of the United States Post Office, the defendants, and others to the Grand Jury unknown, unlawfully, wilfully and knowingly did combine, conspire, confederate and agree together and with each other to violate Section 1709 of Title 18, United States Code.

It was part of the said conspiracy that the defendants unlawfully, wilfully and knowingly would embezzle, steal and abstract articles of mail which had been entrusted to an officer and employee of the United States Postal Service.

Overt Acts

In furtherance of the said conspiracy and to effect the objects thereof, the following overt acts, among others, were committed in the Southern District of New York:

1. On or about January 19, 1972, defendant WALTER SCOTT delivered a registered parcel to defendant HENRY J. JEFFREY at the Rockefeller Center Station Post Office.

2. On or about January 19, 1972, defendant HENRY J. JEFFREY returned said parcel to defendant WALTER SCOTT.

3. On or about January 19, 1972, defendant WALTER SCOTT delivered to defendant HENRY J. JEFFREY \$600.00.

4. On or about February 12, 1973, defendant WALTER SCOTT had a conversation with defendant HENRY J. JEFFREY at the Rockefeller Center Station Post Office.

5. On or about February 13, 1973, defendant HENRY J. JEFFREY obtained and purloined a registered parcel delivered by defendant WALTER SCOTT to the Rockefeller Center Station Post Office.

6. On or about February 14, 1973, defendant HENRY J. JEFFREY delivered said parcel to defendant WALTER SCOTT.

7. On or about February 14, 1973, defendant WALTER SCOTT delivered \$1,500 to defendant HENRY J. JEFFREY.

(Title 18, United States Code, Section 371.)

COUNT TWO

The Grand Jury further charges:

On or about the 19th day of January, 1972, in the Southern District of New York, WALTER SCOTT and HENRY J. JEFFREY, being a United States Postal Service employee, the defendants,

JPC,Jr.:ka

unlawfully, wilfully and knowingly did embezzle a registered parcel # 528130-X which had come into their possession, and was intended to be conveyed by mail, addressed to:

R. & H. Kaplan Inc.
Palm Beach Tower
Palm Beach, Florida

(Title 18, United States Code, Sections 1709 and 2.)

COUNT THREE

The Grand Jury further charges:

On or about the 13th day of February, 1973, in the Southern District of New York, WALTER SCOTT and HENRY J. JEFFREY, being a United States Postal Service employee, the defendants, did unlawfully, wilfully and knowingly embezzle a registered parcel # 528824 which had come into their possession, and was intended to be conveyed by mail, addressed to:

R. D. Eiseman Inc.
Post Office Box 31187
Dallas, Texas 75231

(Title 18, United States Code, Sections 1709 and 2.)

Annie H. Lewett
Foreman

Whitney North Seymour, Jr.
WHITNEY NORTH SEYMOUR, Jr.
United States Attorney

Sept. 12, 1974 HENRY J. JEFFREY: I.S.S. deft. placed on 3 yrs prob./ 1-2-3 on cts
CONCURRENTLY and fined \$2,100.00. Deft.
advised of right to appeal.

Q

(19)

GAGLIARDI, J.

-58)

ct

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JUDGE GAGLIARDI

JUNE 11, 1973, DEFT. JEFFREY (ATTY PRESENT) PLEADS
NOT GUILTY, BAIL CONTINUED

DEFT. SCOTT, (ATTY PRESENT) PLEADS
NOT GUILTY, BAIL CONT'D IN THE AMT. OF \$1000.00 P.R.B.

1-18-74 - memorandum ^{PALMIERI, J} ~~WALTER SCOTT~~ - only - motion to dismiss
Indictment is GRANTED as to DEFT. J.
Gagliardi, J.

(12)

July 29, 1974 HENRY J. JEFFREY, (Atty Thomas
Kavanaugh present) DEFT pleads not guilty. DEFT
waives his rights to a trial by jury. Waiver
signed and filed this date. Court finds the
DEFT. Guilty. P.S.I. Ordered, for sentence
on Sept 12, 1974 at 9:30. DEFT continued
on present bail until date of sentence.
Gagliardi, J.

(10)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FILED
U.S. DISTRICT COURT

1/11/74 9 04 AM '74
S.D. OF N.Y.

UNITED STATES OF AMERICA,

-against-

WALTER SCOTT and HENRY L.
JEFFREY,

Defendants.

-x
: #40244

: 73 Cr. 505

: MEMORANDUM
: DECISION

-----x
GAGLIARDI, D. J.

A three-count indictment charging defendants Walter Scott and Henry L. Jeffrey with conspiracy to embezzle mail and embezzlement of mail was returned in May 1973 following the filing of a complaint on March 13, 1973. Defendant Scott makes this motion to dismiss the indictment on the ground that the government failed to comply with Rule 4 of the Second Circuit's Plan for Prompt Disposition of Criminal Cases under Rule 50(b), F. R. Crim. P. ("Speedy Trial Rules").

Absent any applicable toll, under Rule 4 of the Speedy Trial Rules and the recent case of United States v. Pierro, 478 F.2d 386 (2d Cir. 1973), the government must have communicated its readiness for trial in this case within six months from March 13, 1973, the date of the filing of the complaint. The government filed a notice of readiness stating that it would be ready for trial on or after September 24, 1973 subject to receiving ten days' notice of the actual trial date. It is thus clear that,

unless there are excludable periods, the indictment must be dismissed since the government had failed to communicate its readiness for trial within six months, i.e., on or before September 13, 1973.

The government contends that three of the excludable periods enumerated in Rule 5 of the Speedy Trial Rules are applicable to toll the running of the six-month period in this case. Firstly, the government asserts that the ten-day period immediately following arraignment during which Scott could have made pre-trial motions is excludable from the computation of the six-month period under Rule 5(a) of the Speedy Trial Rules. Rule 5(a) excludes periods of delay "while proceedings concerning the defendant are pending, including . . . pre-trial motions." Since no motions were made, and thus none were pending, during the ten days following arraignment, this period is not properly excludable in computing the time within which the government should have communicated its readiness for trial.

Secondly, the government contends that a 27 day adjournment of Scott's preliminary hearing before the magistrate, to which Scott consented, should be excluded. Rule 5(b) of the Speedy Trial Rules excludes "periods of delay resulting from a continuance granted by the district court" with defendant's consent. Periods of adjournment of proceedings granted by the magistrate are not to be excluded under Rule 5(b) in computing the time within which the government must be ready for trial. This

Rule does not contemplate that "magistrate" be included by the words "district court"; where such inclusion is intended, the Speedy Trial Rules employ the words "court or magistrate." See, e.g., Rule 8(b).

Finally, the government contends that the six-month period was tolled under Rule 5(g) on March 13 when defendant Scott was without counsel. The magistrate immediately appointed counsel on March 14 upon ascertaining Scott's indigency. Rule 5(g) provides no exclusion of time for failure "to provide counsel for an indigent defendant."

It is further argued by the government that, notwithstanding a finding that no portion of the six-month period is tolled under Rule 5, this case cannot be unconditionally dismissed because the government's neglect was excusable. Under Rule 4, if the court determines that the facts surrounding the failure of the government to comply with the six-month limitation present an instance of excusable neglect "the dismissal shall not be effective if the government is ready to proceed to trial within ten days."

In an affidavit submitted in support of the government's claim that its neglect to communicate its readiness for trial was excusable, John P. Cooney, the Assistant United States Attorney assigned to prosecute this case, states that the government was in fact ready for trial at the time of Scott's arraignment on June 11. However, contrary to the regular procedure set

up for compliance with the Speedy Trial Rule, no reminder was received by Mr. Cooney on June 13 from the case control unit of the United States Attorney's office that a notice of readiness was due in the Scott case. It was not until September 24 that Cooney became aware of his omission to prepare and file the notice of readiness. This dereliction was the result of Cooney's good faith belief that a notice of readiness had already been filed against Scott. Cooney's failure to discover or act upon his omission to file until September 24 was due in large part to his unusually busy schedule during the months of June to September.

The government contends that under the standards set forth in United States v. Pierro, 478 F.2d 336 (2d Cir. 1973), the government's neglect to prepare and file a notice of readiness in this case must be deemed excusable. The Court in that case found that the government had acted in good faith, that its normal practice was sufficient to enable it to comply with the Speedy Trial Rules, and that there was no prejudice to the defendant resulting from the government's failure to inform the defendant of its readiness for trial. Under those circumstances, the Court held that the government's neglect was excusable and, for this reason, dismissal of the indictment was not justified.

The facts in the instant case differ significantly from those in Pierro. In the latter case, a notice of readiness was delivered to the trial judge and the government's

neglect was an omission to file a copy of its notice with the court clerk and to inform the defendant of its readiness. The Court stated in that case that the "critical factor" was the delivery of the notice of readiness to the judge's chambers within the six-month period; the court went on to say that although the "better practice" is to file an additional notice with the court clerk and serve a copy on the defendant, the purpose of the notice of readiness is satisfied by the government's communication to the court that the case is ready for trial. *Supra* at 380.

The notice of readiness was not even prepared in the instant case until September 24, after the six-month period had run. Thus, involved here is not a mere excusable failure to comply with the "better practice." There are many references in *Pierro* to the importance and necessity of the government communicating its readiness for trial to the court within the period prescribed by the Speedy Trial Rules. This, the government failed to do in this case. While this court is reluctant to dismiss an indictment where the government was in fact ready for trial within the six-month period but failed to communicate this readiness until shortly after the period had run, a contrary decision would in large part subvert the purposes of the Speedy Trial Rules.

Accordingly, Scott's motion to dismiss the indictment is granted.

So Ordered.

Walter J. ...
New York, New York
January 17, 1974.

Steele F. Bagliardi
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
UNITED STATES OF AMERICA

: 73 Cr. 505

-against-

WALTER SCOTT, and
HENRY J. JEFFREY,

: MEMORANDUM
: DECISION

Defendants. :
-----x

GAGLIARDI, D. J.

A three-count indictment charging defendants Walter Scott and Henry L. Jeffrey with conspiracy to embezzle mail and embezzlement of mail was returned in May 1973 following the filing of a complaint on March 13, 1973. On a motion by defendant Scott, this court earlier dismissed the indictment against him on the ground that the government failed to comply with Rule 4 of the Second Circuit's Plan for Prompt Disposition of Criminal Cases under Rule 50(b), Fed. R. Crim. P. ("Speedy Trial Rules"). United States v. Scott, 73 Cr. 505 (S.D.N.Y., January 17, 1974). Defendant Jeffrey now moves for the same relief.

Absent any applicable toll, the six month period within which the government must have communicated its readiness for trial in this case under Rule 4 of the Speedy Trial Rules commenced on March 13, 1973, the date of the filing

ONLY COPY AVAILABLE

of the complaint. In late June of 1973, the government in effect lost track of this case and neglected to file its notice of readiness until September 24, 1973, eleven days after the six month period had run. Because this court found that the neglect to file was inexcusable and that there were no circumstances present in Scott's case to toll the running of the six month period, the indictment was dismissed as to him. United States v. Scott, supra.

Jeffrey is in a different situation, however. From the time Jeffrey was arraigned on the complaint on March 13, 1973, he voluntarily cooperated with the government. Jeffrey initially made full statements of his involvement and that of defendant Scott in the crimes charged in the indictment and, later, appeared and testified before the Grand Jury in this matter on May 1, 1973. It was the understanding of the government, from its discussions with Jeffrey and his attorney, that Jeffrey intended to plead guilty and cooperate with the government in the trial of his codefendant. Indeed, at the time of Jeffrey's arraignment on the indictment on June 11, 1973, his attorney stated that Jeffrey was prepared to plead guilty; the plea, however, was adjourned so that it could be arranged to be taken before this court. It was at this point that the government lost track of the case until September 24, 1973, and Jeffrey's plea was never entered.

Under Rule 5(h) of the Speedy Trial Rules, a "period of delay occasioned by exceptional circumstances,"

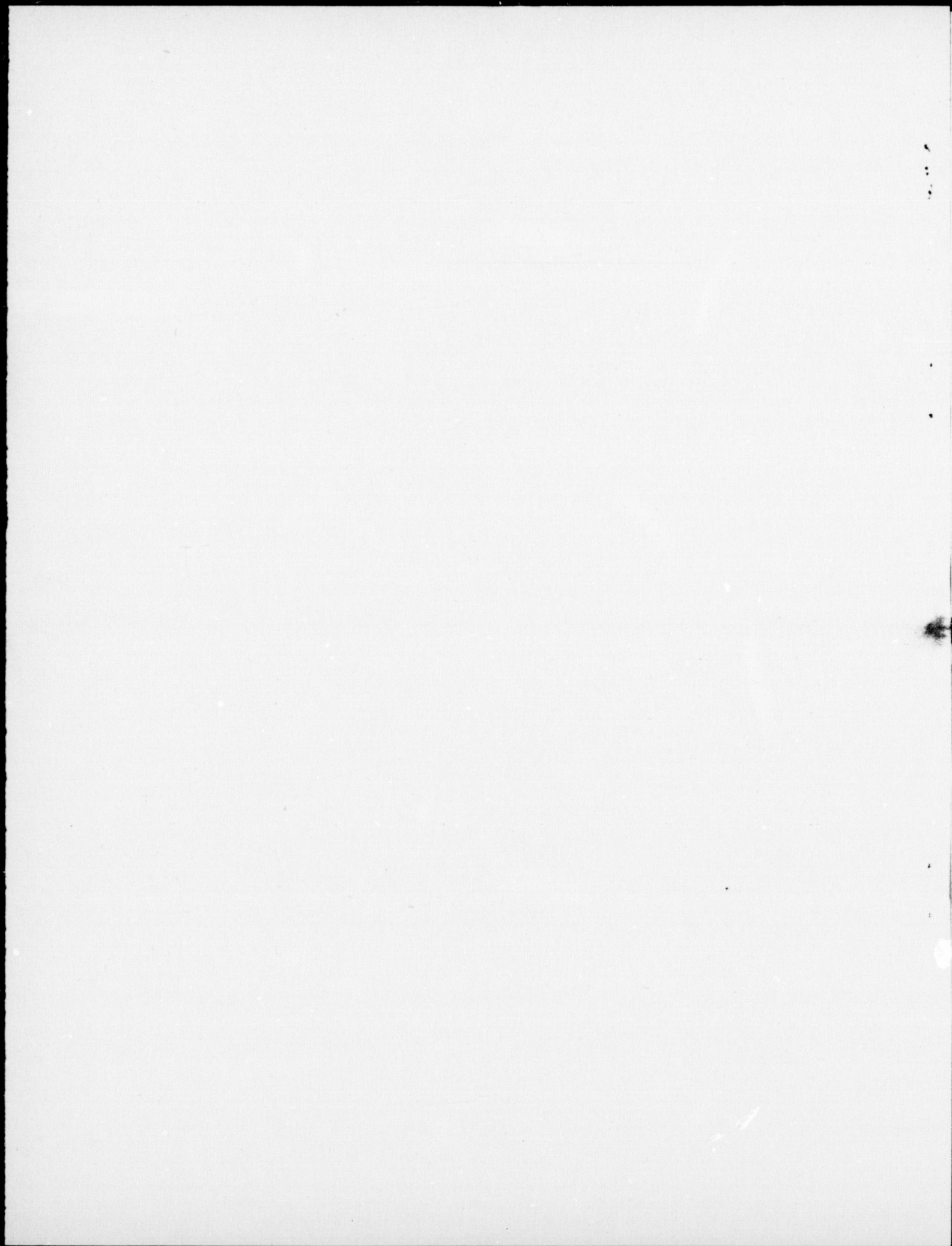
is to be excluded from the computation of the period of time within which the government must be ready for trial. It has been recently held by the Second Circuit that a defendant's offer to cooperate and the government's acceptance of that offer constitutes an "exceptional circumstance" under Rule 5(h), and that the period during which the government believes the defendant to be cooperating must accordingly be excluded from the computation of the six month period specified in Rule 4. United States v. Valot, 481 F.2d 22 (2d Cir. 1973).

In the instant case, it is undisputed that Jeffrey was in fact cooperating with the government from the time of his arraignment on the complaint on March 13, 1973, until at least the time of his arraignment on the indictment on June 11, 1973. Thus, this "period of delay occasioned by exceptional circumstances" must be excluded, and the six month period within which the government must have communicated its readiness for trial in this case commenced no earlier than June 11, 1973. The government's filing of its notice of readiness on September 24, 1973 was well within this period. The defendant's motion must accordingly be denied.

So Ordered.

U.S.D.J.

Dated: New York, New York
June 20, 1974.



Certificate of Service

November 25, 1974

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Southern District of New York.

Raymond A. Berman